UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

SPRINT COMMUNICATIONS COMPANY L.P., Plaintiff, vs. NEBRASKA PUBLIC SERVICE COMMISSION, Utilities Division, Department of Commerce; Frank E. Landis, Jr., in his official capacity as Member of the Nebraska Public Service Commission; Anne C. Boyle, in her official capacity as Member of the Nebraska Public Service Commission; Rod Johnson, in his official capacity as Member of the Nebraska Public Service Commission; and Gerald L. Vap, in his official capacity as Chairman and Member of the Nebraska Public Service Commission, Defendants.	NO: 4-05 CV 03260

PLAINTIFF SPRINT COMMUNICATIONS COMPANY L.P.'S OPPOSITION TO DEFENDANT/INTERVENOR, SOUTHEAST NEBRASKA TELEPHONE COMPANY'S MOTION TO STAY

Plaintiff Sprint Communications Company L.P. ("Sprint") respectfully submits its Brief in Opposition to Defendant/Intervenor Southwest Nebraska Telephone Company's ("SENTCO's") Motion for Stay.

I. INTRODUCTION AND SUMMARY OF SPRINT'S POSITION

SENTCO's Motion for Stay is an attempt to delay this matter to Sprint's prejudice. This case challenges a divided decision of the Nebraska Public Utilities Commission ("State Commission") that rejected Sprint's request to bring an innovative new form of competitive telephone service to rural Nebraska residents. At issue is a straightforward matter of statutory construction—whether a carrier is entitled under Section 251 of the Communications Act of 1934, as amended, 47 U.S.C. § 251 et seq. ("Act"), to interconnect with an incumbent local exchange carrier for the purpose of transmitting traffic to or from another service provider.

In particular, Sprint seeks to interconnect with SENTCO, which presently has a monopoly in rural Nebraska territories. Sprint seeks to do so to enable it and Time Warner Cable ("TWC") to provide a competitive new and innovative voice service to residents of that area. Sprint is providing similar services in conjunction with other cable companies in Lincoln and in other states. Thus far, state commissions in New York, Illinois, Iowa and Ohio have recognized a carrier's right to interconnection under this model. In the proceeding below, however, a divided State Commission construed the Act incorrectly to favor the local monopoly, SENTCO, to deny Sprint its right to interconnect and to deny rural Nebraska residents of a voice service option that is available to Lincoln residents and to households across the nation. Sprint now seeks review of that decision by this District Court in the hope of bringing this new voice service to rural Nebraska residents as quickly as possible.

SENTCO requests that the Court stay this action pending the FCC's potential consideration of a petition for declaratory ruling filed by TWC. Although TWC has filed an

amicus brief in this case, it is not a party here. Its petition before the FCC raises the question of whether the Act entitles a competitive carrier, like Sprint, to interconnect with the incumbent carrier for the purpose of transmitting traffic to another service provider, like TWC. As SENTCO admits, there is no way to know when, or even if, the FCC will reach the merits of that question. SENTCO cites no legal basis to support its claim that this case should be stayed pending the FCC's *potential* determination of a statutory construction issue. It is settled that a stay is warranted pending determination of an issue by an agency *only* when the issue requires specialized knowledge of the agency and where the benefits of the stay outweigh the costs. SENTCO has failed to meet either of these requirements.

With regard to the first requirement, issues of statutory construction do not require specialized knowledge of administrative agencies and are well within the purview of this Court. More importantly, is it unclear when, if at all, the FCC will issue an opinion on the issue. Notwithstanding, any such opinion could readily be implemented by this Court if the FCC handed one down. Accordingly, there is no basis to stay the case at this time.

With regard to the second requirement, the benefits of waiting based on the *possibility* of an FCC opinion are far outweighed by the *certain* harm that will inure to Sprint if SENTCO's stay is granted. Congress enacted the Act to encourage *rapid deployment* of new innovative technologies. Moreover, the Act provides for *exclusive* federal district court review of any interconnection dispute that a state agency arbitrates. 47 U.S.C. §§ 252(e)(4), (6). Under the Act, the FCC assumes jurisdiction over interconnection arbitrations only in those instances where the state agency fails to act or to carry out is responsibility under the Act. *Id.* § 252(e)(5).

Accordingly, any delay in adjudicating this case would frustrate the core purposes of the Act and would undermine Congress's express grant of exclusive review jurisdiction to this

Court. Courts that have addressed similar stay requests have found that "agency decisionmaking often takes a long time and the delay imposes enormous costs on individuals, society and the legal system." *National Comm. Ass'n v. AT&T*, 46 F. 3d 220, 225 (2nd Cir. 1995). SENTCO acknowledges that the likelihood of the FCC determining the legal issues here is tentative at best. Under these circumstances, where the issue is one of statutory construction which the District Court can expeditiously determine, and where the Court could implement any decision by the FCC if the FCC happens to issue one in prompt fashion, Sprint's interest in a prompt adjudication outweighs any benefit that might be obtained by waiting months, and potentially even years, for the FCC to act, or not act, on TWC's petition.

For these reasons, Sprint respectfully requests that the Court deny SENTCO's Motion for Stay in its entirety, and reinstate the briefing schedule as soon as possible.

II. ARGUMENT

A. SENTCO Cites No Legal Basis For The Requested Stay

SENTCO's Motion for Stay cites no authority in support of its request. This is hardly surprising because the law on point supports Sprint, not SENTCO.

Only under limited circumstances can district courts stay a suit pending resolution of some portion of an action by the relevant administrative agency. *See, e.g. AT&T Communications of the Southwest, Inc. v. City of Austin, Texas*, 975 F. Supp. 928, 938 (W.D. Tex. 1997); *Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993); *Wagner & Brown v. ANR Pipeline Co.*, 837 F. 2d 199, 201 (5th Cir. 1988). Stays are not appropriate simply because an administrative agency takes action on the same or similar subject matter. *Nader v. Alleghany Airlines*, 46 U.S. 290, 303 (1976). Rather, a stay is appropriate *only* where issues raised in the litigation involves a matter requiring specialized agency knowledge and/or the application of detailed agency regulations *and* where the benefits of agency review exceed the costs on the

parties. *Id.*, *see also Wagner & Brown v. ANR Pipeline Co.*, 837 F. 2d 199, 201 (5th Cir. 1988). Only then is an administrative agency, such as the FCC, better suited to exercise its expertise in the first instance. *Great Northern Rwy. v. Merchants Elev. Co.*, 259 U.S. 285, 291 (1922). A strong showing is required to remove a matter from the Court, which is otherwise empowered to hear it under basic jurisdictional principles. *National Comm. Ass'n v. AT&T*, 46 F. 3d at 224. Here, SENTCO can satisfy neither of the two required factors.

B. The Issue of Whether The Act Entitles Sprint To Interconnect With SENTCO For The Purpose Of Transmitting Traffic To TWC Is A Straightforward Issue Of Statutory Construction That Does Not Necessitate Special Agency Expertise

Deferral of issues to an administrative agency is only warranted (and judicial efficiency is only served) if the issue involved is one requiring special expertise existing in an administrative body. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956). As the Supreme Court held in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), when the matter at issue is "within the conventional competence of the courts," then the "judgment of a technically expert body is not likely to be helpful in the application of [existing] standards to the facts of [the] case." *Id.* at p. 305-306.

The issue before the FCC in the TWC Petition is whether the Act entitles a carrier like Sprint to interconnect with an incumbent local exchange carrier for the purpose of transmitting traffic to or from another service provider. Moving Papers, exh. 1 at 1-2. This is not a matter that requires technical expertise that an administrative agency might possess, but rather is a matter of statutory construction. Deferral to an agency is not appropriate when the matter is one of statutory construction rather than technical factual or policy determinations. *AT&T Comm. of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 938 (W.D. Tex. 1997).

For instance, in *AT&T v. City of Dallas*, 8 F. Supp. 2d 582, 590 (N.D. Tex 1998), AT&T brought suit against Dallas under the Act arising out of the city's requirement that

AT&T comply with a form franchise ordinance in order to provide authorized local telephone service. The city argued that the district court should stay or dismiss the action pending determination of whether the Act preempted the ordinance at issue by the FCC. *Dallas*, 8 F. Supp. 2d at 590. The court disagreed, and held:

> While the issue raised by the City may be related to AT&T's claims, its resolution involves construction of the Act's provisions, and not necessarily policy determinations. The Court is as well equipped as the [FCC] to conduct this statutory analysis. *Id.*

Likewise, the only issue in the TWC Petition is one of statutory interpretation which the district court can determine without resort to any administrative agency.

Furthermore, if the FCC timely issues an opinion on the question that TWC has raised, this Court may freely apply that decision to this case at that time. Indeed, even when courts refer issues to an administrative agency, they retain the ultimate power to make a final determination. "If a court holds that a particular agency has primary jurisdiction to decide a question, the court usually continues to have the power of review so that in the end it has power to make a final determination." *Johnson v. Artim*, 826 F. 2d 538, 548 (7th Cir. 1987).

Therefore, even if the FCC timely decides the question raised in TWC's petition, the Court may implement that decision as the final arbiter of this issue of statutory construction. *Id.*; *see also AT&T v. Ameritech Corp.*, 1998 U.S. Dist. LEXIS 9175 at * 10 (N.D. Ill. June 10, 1998 ("Referring a case to an agency simply allows the court to consider the agency's views when rendering its decision; it does not shift the power to determine a federal lawsuit to an administrative agency.") A stay therefore would only serve the purpose of permitting undue delay in the event that the FCC *fails* to timely address the statutory construction issue.

Because the issue here is one of statutory construction, SENTCO's reliance on *Vonage Holdings Corp. v. MCI Worldcom Comm., Inc.*, 394 F.3d 568 (8th Cir. 2004) is misplaced. *Vonage* involved the issue of whether federal communications law preempted state regulation of voice over internet protocol service. That question raised technical issues uniquely within the province of the FCC's specialized expertise. Accordingly, the Eighth Circuit held that an FCC order that held that the state regulations were preempted was binding on the courts and compelled affirmance of the district court's decision to the same effect. *Id.* at 569.

But because the issue here is one of statutory construction, it is well within the conventional competence of the courts and does not require any specialized expertise. *AT&T*, 8 F. Supp. 2d at 590. Moreover, as *Vonage* shows, any FCC decision can be implemented by the courts, when and if the FCC hands one down. Indeed, the district court in Vonage did *not* stay the matter pending the FCC's resolution of the question but proceeded to decide the case on the merits. Doing so protects the rights of the parties in the event the FCC either does not ultimately reach the question or delays unduly in doing so.

For these reasons, courts have determined that a stay is not warranted to allow an agency to initially determine issues of statutory construction. *See, e.g. AT&T. v. City of Austin*, 975 F. Supp. at 938 (deferral to FCC of issue of statutory construction inappropriate); *AT&T v. City of Dallas*, 8 F. Supp. 2d at 590 (same). This Court should deny a stay here.

C. Stay of This Case Would Not Advance The Interests of Justice Or Judicial Efficiency

Also relevant to the determination of whether a stay is appropriate is whether the parties' need to resolve the action expeditiously is outweighed by the benefits of obtaining the federal agency's expertise on a particular issue. *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F. 2d 1465, 1473 (5th Cir.), *opinion amended by* 831 F. 2d 557 (5th Cir. 1987). The Court can defer to the agency "only if the benefits of agency review exceed the costs imposed

on the parties." *Wagner & Brown v. ANR Pipeline Co.*, 837 F. 2d 199, 201 (5th Cir. 1987).

The benefits that could potentially be gained by staying this case are minimal and are certainly outweighed by the costs that would inure to Sprint. As SENTCO acknowledges in its papers, the FCC may never act on TWC's Petition, and therefore may never address the question raised in that Petition. Moving Papers at p. 6. As noted, the likely delay in agency decisionmaking "imposes enormous costs on individuals, society and the legal system." *National Communications Association v. AT&T*, 46 F. 3d at 225. In fact, the FCC may take months or even years to reach a decision on this issue, if it decides the issue at all. Unlike this Court, the FCC is not obligated to render a decision, and it may indeed close the proceeding without doing so. Also, once the FCC decides the issue, if it does, there may be requests for reconsideration and appeals to the federal appellate courts, both of which could result in reversal. In cases such as this, where the Court must independently analyze the matter of statutory construction at issue with or without an opinion from the FCC, this Court can conclude this matter far more expeditiously on its own.

Furthermore, Congress enacted the Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the *rapid deployment* of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996). Congress also prohibited state governments from promulgating rules that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253.

Accordingly, a stay of months or years in this case to await the *possibility* of the FCC's determination of the matter at issue would undermine and frustrate Congress's purpose in stimulating the *rapid* deployment of new service options. A further delay preventing Sprint

from providing its new services to the residents of rural Nebraska will result not only in substantial harm to Sprint, but also to the affected residents. Until this case is resolved, Sprint is barred from entering the market, is losing a valuable business opportunity, is suffering an adverse impact in its relationship with its wholesale customer, TWC. And consumers are being denied a service option that many across the nation have found beneficial. These harms cannot be undone even if Sprint is allowed into the market late.

In circumstances such as this, Sprint's interest in speed outweighs any benefit that might be obtained by soliciting the FCC's opinion on the matter at hand. *See, e.g., APCC Services, Inc. v. Worldcom, Inc.*, 305 F. Supp. 2d 1, 20 (D. D.C. 2001); *AT&T v. City of Dallas*, 8 F. Supp. at 590 ("AT&T has a significant interest in swift adjudication of its claims to prevent substantial threatened harm. Referral to the FCC would lead to lengthy delays. . . AT&T's interest in speed outweighs any benefit that might be obtained by soliciting the FCC's opinion on the particular matters at hand.")

A stay would also be inconsistent with the review process that Congress established under the Act. Under the Act, if a state agency chooses to arbitrate an interconnection dispute, the federal district court has *exclusive* review jurisdiction of the state agency's action. *Id.* §§ 252(e)(4), (e)(6). By contrast, if the state agency declines to act on the interconnection dispute, the FCC may issue an order preempting the state agency's action and the FCC then assumes jurisdiction. *Id.* § 252(e)(5). Granting a stay here would yield the anomalous result that although the state agency did act, and therefore, this Court acquired exclusive review jurisdiction, the matter would be effectively passed to the FCC. And that result is even more curious because it would mean that an FCC filing by a non-party (TWC) would substantially affect the rights of Sprint, a party.

For all these reasons, SENTCO's motion should be denied.

D. The Court Should Reinstate The Briefing Schedule Established By The Court's January 18, 2006 Memorandum and Order.

Simply by filing its motion, SENTCO has already achieved one substantial delay—the Court has suspended the briefing schedule established by the Court's January 18, 2006 Memorandum and Order. Because any further delay in this case will threaten to cause Sprint and the residents of rural Nebraska substantial harm and because there is no basis to stay or delay this case any further, Sprint respectfully requests that the Court reinstate the briefing schedule as soon as reasonably possible.

Sprint believes it would be reasonable to order SENTCO and the State defendants to file their answering briefs on the merits within 14 days of any order denying SENTCO's stay motion. Sprint filed its opening brief within 30 days of the filing of the administrative record. SENTCO had a full month—or the entire time Sprint took to write its brief—to prepare its answering brief after Sprint filed its brief and before SENTCO filed its stay motion. And although the Court thereafter suspended the briefing schedule, that order does not prevent SENTCO and the State defendants from continuing to work on their answering briefs. Accordingly, 14 days should be more than ample time for SENTCO and the State defendants to complete and file their briefs. And since the original briefing schedule afforded Sprint and TWC 21 days to file their reply briefs, the Court should also provide that Sprint and TWC have 21 days from the filing of SENCTO's and the State defendants' briefs to file their replies.

DATED this 24th day of March, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 24, 2006, I electronically filed the foregoing PLAINTIFF SPRINT COMMUNICATIONS COMPANY L.P.'S OPPOSITION TO DEFENDANT/INTERVENOR SOUTHEAST NEBRASKA TELEPHONE COMPANY'S MOTION TO STAY] with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

SPRINT COMMUNICATIONS COMPANY L.P., Plaintiff, vs. NEBRASKA PUBLIC SERVICE COMMISSION, Utilities Division, Department of Commerce; Frank E. Landis, Jr., in his official capacity as Member of the Nebraska Public Service Commission; Anne C. Boyle, in her official capacity as Member of the Nebraska Public Service Commission; Rod Johnson, in his official capacity as Member of the Nebraska Public Service Commission; and Gerald L. Vap, in his official capacity as Chairman and Member of the Nebraska Public Service Commission, Defendants.	NO: 4-05 CV 03260

[PROPOSED] ORDER DENYING DEFENDANT/INTERVENOR SOUTHEAST NEBRASKA TELEPHONE COMPANY'S MOTION TO STAY

The Motion for Stay filed by Defendant/Intervenor Southeast Nebraska Telephone Company's ("SENTCO") is denied. The Court hereby reinstates the briefing schedule as follows: SENTCO and the Nebraska Public Service Commission and its Commissioners shall file their answering briefs on the merits within 14 days of this order. Plaintiff Sprint shall file its closing brief within 35 days of this order. If amicus curiae Time Warner Cable chooses to file a closing amicus curiae brief, its shall do so within 35 days of this order.

DATED this __ day of _____, 2006.

By: _____
United States District Judge